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DOW, LOHNES & ALBERTSON, PLLC
1200 New Hampshire Avenue, N.W.
Suite 800
Washington, D.C. 20036-6802
(202) 776-2000

Leonard J. Kennedy
Laura H. Phillips
Christina H. Burrow

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SUMMARY

Competition, with its benefits of new services provided by additional service providers, is the policy goal behind the 1993 Budget Act and Section 309(j). In keeping with Congress' direction, the Commission developed the broadband PCS rules to ensure that every market had at least two cellular and three major PCS providers. Consistent with its original public policy goals, the Commission must reactuate available licenses in the manner that adds to the field of viable competitors. On reconsideration, therefore, the Commission must adopt new auction rules that eliminate the designated entity set-aside and package certain of the available licenses on a bulk bid basis for purposes of the upcoming July 26, 2000 PCS C and F Block reauction.

Despite their assertions, the Sprint/US West proposal to divide C Block licenses into three 10 MHz blocks and to auction C and F Block licenses solely on a BTA-by-BTA basis would not advance competition against regional or national service providers. Indeed, the Commission found in 1994 that its licensing decision must respond to marketplace competitive circumstances. It, therefore, decided to license three 30 MHz providers. US West and Sprint essentially ask the Commission to overrule this determination for reasons of their competitive advantage in a divide-and-conquer strategy intended to keep new, viable competitors out of the market. At this juncture, the best the Commission can do is to divide the 30 MHz licenses into 20 and 10 MHz blocks and combine the available 20 and 15 MHz licenses into a bulk bid package. The reauction should provide bidding credits for designated entities and be conducted with the spectrum cap in place. Only by adopting this set of auction rules will the Commission ensure that all consumers obtain the promised competitive benefits that were supposed to come from PCS, even consumers in rural areas.

Nextel previously has shown that this auction structure ensures that licenses that have lain fallow since the Commission's initial C Block auctions are put in service promptly to serve the American public. In particular, the bulk bid proposal will foster the creation of a strong, national competitor in the rapidly-consolidating wireless marketplace. At the same time, because 93 new 10 MHz BTA licenses and bidding credits for eligible designated entities will be available at the reauction, designated entities will be able to both participate in the auction and win licenses. The Sprint/U S West subdivide and conquer strategy, on the other hand, would make it extremely difficult, if not impossible, for any new market entrant to assemble a large enough footprint to compete effectively. It would also create significant advantages for entrenched incumbents in the wireless marketplace as it would fragment spectrum in a manner that would starkly differentiate the spectrum-rich and the spectrum-poor.

While removing the designated entity set-aside would best serve the public interest, if the set-aside is maintained, it must be fine-tuned to avoid turning the policy reasons behind any set-aside upside down. Specifically, the Commission must reconsider its decision to "grandfather" entities into the reauction so that participants in the initial C Block auctions can bid in the reauction regardless of their current size. The Commission must also review its rules on computing "total assets" for purposes of determining whether an entity falls under the "entrepreneurs block" \$500 million asset cap. Finally, if the "grandfathering" provision is maintained, the Commission must confirm that it only applies to the actual entities that participated in the first C Block auctions and does not apply to successor corporations.

Without these changes, if the set-aside is maintained, the Commission will be conducting an auction where some multi-billion dollar entities have an artificial mega-advantage – they can compete for licenses while others are barred. Obviously, permitting some multi-billion dollar

entities to participate in auctions intended for “small” businesses would make a mockery of the designated entity rules and would deny true small businesses any real opportunity to obtain licenses. Such a result would also be irrational, arbitrary and capricious.

An open auction with a bulk bid package of licenses best serves the public interest. All interested eligible entities would be able to participate, and designated entities would have bidding credits to enable them to win licenses in the auction. This approach not only is fair to large and small companies alike, but greatly increases the likelihood that winning bidders will have the resources to construct and operate their systems. On reconsideration the Commission must, therefore, adopt new auction rules without delay.

TABLE OF CONTENTS

SUMMARY	i
I. AN OPEN AUCTION AND BULK BID BEST SERVE THE PUBLIC INTEREST	3
A. Small Businesses Are Ill-Suited to Acquire, Build and Operate the Licenses Available in the July 26 Reauction.....	3
B. A Bulk Bid Opportunity Promotes Competition and Rural Service.....	4
C. Current Spectrum Cap Limits Should Be Retained, but Auction Participation Subject to Divestiture Should Be Allowed.....	8
II. A SET-ASIDE FOR A FEW MULTI-BILLION DOLLAR “SMALL” BUSINESSES IS UNLAWFUL	9
A. The Current Grandfathering Exception Is Antithetical to the Designated Entity Rules.	10
B. Clarification Is Necessary to Prevent Unjust Enrichment.	12
C. Successor Entities Should Not Qualify for “Grandfathered” Status.	13
III. CONCLUSION.....	14

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Amendment of the Commission's Rules)	
Regarding Installment Payment Financing)	WT Docket No. 97-82
for Personal Communications Services (PCS))	DA Number 00-760
Licenses)	
)	
Order on Reconsideration of the Fourth Report)	
and Order)	

**COMMENTS ON AND OPPOSITION TO
PETITION FOR RECONSIDERATION**

Nextel Communications, Inc. ("Nextel"), by its attorneys, hereby submits its comments on and opposition to the Petition for Reconsideration on the Order on Reconsideration of the Fourth Report and Order filed by U S WEST Wireless, LLC ("U S West") and Sprint Spectrum L.P. dba Sprint PCS ("Sprint") (the "Petition") in the above-captioned proceeding.¹ As Nextel urged in its Petition for Expedited Rulemaking, the auction of broadband personal communications service ("PCS") licenses currently scheduled to commence on July 26, 2000 should be conducted under rules that:

- eliminate the designated entity set-aside and open the auction to all otherwise eligible entities;

¹ *Wireless Telecommunications Bureau Sets Comment Schedule for Petitions for Reconsideration of the Order on Reconsideration of the Fourth Report and Order* in WT Docket No. 97-82, Public Notice, DA 00-760, (rel. Apr. 5, 2000). *See also* Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses, *Order on Reconsideration of the Fourth Report and Order*, WT Docket 97-82, FCC 00-54, (rel. Feb. 29, 2000). ("Reconsideration Order"). The *Reconsideration Order* addressed issues raised in petitions that sought changes to Commission rules applicable to the auction of returned or recovered C and F Block PCS licenses.

- divide the available 30 MHz licenses into 20 MHz and 10 MHz licenses;
- combine the newly available 20 MHz licenses with the available 15 MHz licenses and auction them exclusively on a bulk bid basis;
- remove the current limit on the number of C and F Block licenses that can be held by a single entity; and
- provide bidding credits for eligible designated entities.²

Nextel agrees with the Petition that the Commission should swiftly issue new rules and, if the Commission deems it necessary, Nextel would not oppose the retention of the designated entity set-aside for one of the new 10 MHz license blocks outside of the top 50 markets.

While the Sprint/U S West Petition is consistent with aspects of the auction plan set forth in Nextel's Petition, their Petition has two significant flaws. First, not all available licenses should be auctioned on a BTA-by-BTA basis. The newly created 20 MHz licenses must be combined with the available 15 MHz licenses and auctioned on a bulk bid basis. Competition will not be enhanced if the Sprint PCS/U S West proposal to divide the 30 MHz licenses into three new licenses that are auctioned on a license-by-license basis is adopted. Indeed, new entrants would be hindered in their efforts to obtain adequate spectrum and a market footprint to compete with a nationwide provider like Sprint under the Petition's proposal.

Second, Nextel opposes the Petition's approach to the spectrum cap.³ The Commission ruled there was no basis for elimination of the spectrum cap only seven months ago, and its elimination will spur even more dramatic consolidation in the industry than has occurred to date.

² See *In the Matter of Reauction of Certain C and F Block Broadband PCS Licenses, Petition for Expedited Rulemaking Or, In the Alternative, Waiver of the Commission's Rules*, filed by Nextel Communications, Inc., (Jan. 31, 2000) ("Nextel Petition"). See also *Wireless Telecommunications Bureau Seeks Comments on Nextel Communications, Inc.'s Petition Regarding PCS C and F Block Spectrum*, Public Notice, DA 00-191 (rel. Feb. 3, 2000).

³ Petition at 9, n.19 (U S West and Sprint take no position on spectrum cap issues).

Consolidation that lessens competition is obviously contrary to the purposes of the Act. As none of the individual waiver requests filed thus far have met the Commission's waiver standards, the spectrum cap must remain in place for the reauction. Indeed, under Nextel's proposal, no change to the spectrum cap is needed because new entrants or spectrum-challenged competitors can compete to obtain the bulk bid package.

Nextel urges the Commission to remove the designated entity set-aside for the upcoming reauction. If, however, the Commission retains designated entity benefits, it must make sure that only qualified entities benefit. Accordingly, the Commission must reconsider or clarify the interpretation of Section 24.709(b)(9)(i) of the rules. It is inconsistent with the pro-competitive purposes of the 1993 Budget Act to allow entities that acquired C Block licenses four years ago and have since grown enormously to participate in the July 26 reauction as designated entities. The Commission must clarify that multi-billion dollar firms may not participate in the upcoming reauction as entrepreneurs. **The designated entity set-aside debate is deteriorating into a controversy over how to shoehorn large businesses into the small business category and how to ensure them guaranteed cash-outs.** Nothing would be more harmful than for the Commission to tolerate sophisticated efforts to game the rules. Competition, new services and service providers are the core policy grounds advanced by Section 309(j) and the 1993 Budget Act, and the Commission should craft its reauction rules accordingly.

I. AN OPEN AUCTION AND BULK BID BEST SERVE THE PUBLIC INTEREST.

A. Small Businesses Are Ill-Suited to Acquire, Build and Operate the Licenses Available in the July 26 Reauction.

Nextel supports the Petition in its request to lift the designated entity set-aside for the upcoming July 26, 2000 PCS reauction. Nextel has already detailed the numerous factual and

policy reasons that support opening the reauction to all otherwise eligible entities.⁴ Indeed, the record to date conclusively establishes that licenses in major metropolitan areas are particularly ill-suited to development by small businesses. Because of the size of the markets involved and the state of competition within those markets, small business new entrants will be strained beyond the breaking point by the spectrum acquisition and capital costs required to build out and operate a new PCS system. As Nextel has demonstrated, the capital required to buildout facilities in the New York BTA alone approach \$1 billion before positive cash flow is achieved.⁵ The financial requirements and execution risks are so great the Commission cannot in good conscience restrict the auction of this spectrum to designated entities.⁶

B. A Bulk Bid Opportunity Promotes Competition and Rural Service.

Nextel opposes the Petition in its request to reauction all available licenses on a market-by-market basis. Rather than auctioning all available licenses on a BTA-by-BTA basis, the Commission should auction the new 20 MHz licenses with the available 15 MHz licenses exclusively on a bulk bid basis. A bulk bid package would promote competition, expeditious buildout and improved rural service.

⁴ See Nextel Petition at 11-16; Reply Comments of Nextel Communications, Inc., In the Matter of Petition of Nextel Communications, Inc. for Expedited Rulemaking Or, In the Alternative, Waiver of the Commission's Rules for the Reauction of Certain C and F Block Broadband PCS Licenses ("Nextel Reply Comments") at 11-18.

⁵ Nextel Reply Comments at 25.

⁶ The Commission should not adopt SBC's proposal to lift the designated entity set-aside only for markets with populations above 700,000. See Letter from Russell Jackson, Executive Director, Federal Regulatory, SBC Communications Inc. to Magalie Roman Salas, Secretary, Federal Communications Commission (April 7, 2000) (DA 00-191 and DA 00-318) *ex parte* presentation at 1, 5-6. Such a proposal fails to recognize the interrelationships between various PCS markets and would, for example, preclude a carrier bidding on the New York BTA to also bid on the adjoining available market of Allentown, Poughkeepsie, Scranton and Stroudsburg. No public interest is served, and competition will be harmed, if SBC's win some, lose some
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It is undisputed that a bulk bid approach would inject PCS competition into markets for which licenses went unsold in the C Block reauction held in March of last year.⁷ The designated entities, despite their claims that they are the best-suited to obtain and build-out rural and secondary markets, simply have not wanted these licenses. The bulk bid proposal is thus the only proposal in the record that ensures swift service to rural areas because it ties unwanted rural licenses to attractive urban markets. The bulk bid proposal also ensures that these rural markets get the advantages of integrated, national service, including cost advantages that can and will be passed on to consumers.⁸

Further, the bulk bid package is not, as some have claimed, suited only to Nextel. When major carrier spectrum positions are analyzed, it becomes apparent that several carriers could bid for the bulk bid package with few, if any, required divestitures under current spectrum cap rules.⁹

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proposal is accepted. This risk is particularly great because a national footprint helps ensure that services in small and rural markets are efficiently integrated in national offerings.

⁷ Many of the licenses that would be included in the bulk bid package are in markets that have yet to see any PCS competition. As they are primarily rural and secondary market BTAs, MTA A and B Block PCS licensees have, by and large, not built out their systems in these locations, choosing instead to concentrate their efforts on the more densely populated urban areas. Many D, E and F Block licensees also have yet to construct in these areas.

⁸ Some have claimed that bundling the licenses and requiring expedited build-out will result in poor service in the rural market areas because the winning bidder will be forced to install “subsidized” infrastructure taken from profits from the urban areas. *See* Letter from Howard Frisch, Sales Director, UTStarcom, to Magalie Roman Salas, Secretary, Federal Communications Commission (March 9, 2000) (DA 00-504). Contrary to these assertions, the comparison is not between “poor” service provided by a national provider and presumably better service provided by a designated entity. Rather, the choice appears to be between service from the national carrier bulk bid winner or no PCS service at all because designated entities did not bid on these rural licenses.

⁹ *See, e.g.*, Letter from Laura S. Roecklein, Counsel to Nextel Communication, Inc. to Magalie Roman Salas, Secretary, Federal Communications Commission (April 4, 2000) (DA 00-191) *ex parte* presentation chart entitled “Potential Major Carrier Spectrum Holdings Under PCS Reauction”.

In addition, at least one new entrant has told the Commission that key initiatives to its business plan include securing a “nationwide PCS footprint.”¹⁰ Accordingly, the facts reveal that many entities would be eligible to bid on and obtain the package of licenses.

Those opposing the bulk bid package seek to avoid the quick and efficient injection of additional competition into the market.¹¹ To decrease the threat of a new viable competitor entering their market areas, some incumbents, such as U S West and Sprint, support changing the band plan by splitting the 30 MHz licenses into three new 10 MHz licenses. The Commission should eschew this sub-divide and conquer strategy.

Rather than increasing competition, dividing the 30 MHz licenses into three 10 MHz licenses and auctioning them all on a BTA, market-by-market basis could decrease the number of competitors. It is well known in economics, and has been recognized by the Commission, that a firm with an existing position in a market has a higher value for an asset than a new entrant if the new entrant would increase competition and drive prices down.¹² Accordingly, it is logical

¹⁰ See Letter from Cheryl A. Tritt, Counsel to Burst Networks, Inc. to Magalie Roman Salas, Secretary, Federal Communications Commission (April 11, 2000) (DA 00-191).

¹¹ The Commission should not ignore the irony of the fact that while this proceeding has been pending, two more major carriers, BellSouth and SBC Communications, have announced plans to merge their wireless operations. Monica Allevan, *SBC, Bell South Take Wireless Vows*, *Wireless Week*, Apr. 10, 2000. The BellSouth – SBC combination will create the second largest U.S. wireless carrier with 16.2 million customers, more than AT&T Wireless at 13 million but still less than the new Bell Atlantic-Vodafone-Airtouch-PrimeCo wireless entity, the recently unveiled Verizon, at 24 million U.S. domestic customers. *Id.*

¹² See, e.g., Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission’s Rules to Redesignated the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, *Sixth Notice of Proposed Rulemaking*, CC Docket No. 92-297, FCC 99-379 (rel. Dec. 13, 1999) (seeking comment on whether incumbent local exchange carriers and cable operators would attempt to obtain local multipoint distribution service (“LMDS”) licenses to forestall the entry of potential competitors). A recent economic study criticizes the German telecommunications authority for structuring an auction that the authors (with no stake in the proceeding) show is likely to lead to limited additional competition. See Philippe Jehiel and
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for an incumbent with a strong spectrum position and a nearly national footprint, such as Sprint, to advocate splitting the 30 MHz licenses into far smaller pieces so that current incumbents -- acting independently but for common purposes -- can acquire them and thereby keep a robust new entrant from emerging.¹³

The Commission, in fact, found when establishing the original broadband PCS rules that 10 MHz (even 20 MHz) may be insufficient to support head-on competition with existing cellular incumbents and A and B Block broadband PCS licensees.¹⁴ U S West argued then that 30 MHz is necessary to support new entrants.¹⁵ The Commission must not now, therefore, capitulate to the blandishments of these incumbents and carve up the C Block so that a new competitor will not emerge. Consistent with its statutory obligations, it must encourage the emergence of the fifth provider the C Block was intended to create. Because the marketplace has changed since 1994 from a world of local into a world of nationwide wireless carriers, the available C Block licenses must be auctioned on a bulk bid basis. Absent a bulk bid, existing

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Benny Moldovanu, "A Critique of the Planned Rules for the German UMTS/IMT-2000 License Auction."

¹³ Should the Commission nevertheless adopt a 10-10-10 license split, combining one set of 10 MHz licenses with the available 15 MHz licenses into a bulk bid package would still be pro-competitive.

¹⁴ Amendment of the Commission's Rules to Establish New Personal Communications Services, *Memorandum Opinion and Order*, 9 FCC Rcd 4957 (1994) at ¶ 55 ("The record indicates significant concern that a 20 MHz block may not provide sufficient spectrum to enable a PCS provider to compete effectively with other PCS licensees operating on 30 MHz spectrum blocks or with other commercial mobile radio service providers.").

¹⁵ *Id.* at ¶ 49 (citing U S West).

national incumbents will bid astronomical prices in select markets to complete their footprints and foreclose the emergence of a fifth nationwide competitor.¹⁶

Combining some of the available licenses on a bulk bid basis will quickly inject competition into both rural and urban areas. The bulk bid package will promote new entry and competition rather than the interests of incumbents with no credibly-demonstrated need for additional spectrum. In rural areas, the bulk bid package will ensure that licenses are finally obtained and built by a carrier with sufficient resources to offer rural consumers the same network benefits available in urban areas today. As the only arguments against a bulk bid package are arguments designed to keep another strong carrier from entering the nationwide wireless marketplace, a bulk bid package approach should be adopted.

C. Current Spectrum Cap Limits Should Be Retained, but Auction Participation Subject to Divestiture Should Be Allowed.

No party has made a credible case for changing current spectrum cap limits.¹⁷ Rather than promoting competition, relaxation of the spectrum cap is likely to further strengthen large incumbents at the expense of the spectrum-challenged or new entrants. As discussed above, incumbent carriers have an incentive to exclude potential new rivals of any magnitude. Raising the spectrum cap, especially if the Commission fails to offer the licenses on a bundled basis, will allow large incumbents to do just that.

¹⁶ Nextel acknowledges that 20 MHz of spectrum is not as strong of a competitive position as is 30 MHz of spectrum. Indeed, Nextel believes that the most pro-competitive step the Commission could take would be to keep the C Block together, lift the eligibility restriction, and auction all available C Block licenses on a bulk bid basis. Because this course of action is unlikely, Nextel has asked for, and supports, a second-best alternative that will still allow the C Block to be used to promote the public interest in robust competition.

¹⁷ Despite carrier claims that they need additional spectrum to provide 3G services, no large incumbent has made any factual showing in the reauction proceedings to support a claim
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Rather than waiving or lifting the spectrum cap, the Commission should recognize that carriers may participate in the reauction, especially in bidding on the bulk bid package, within current spectrum cap limits. CMRS carriers have shown themselves to be quite able to effectuate necessary divestitures as part of large and complex mergers.¹⁸ Accordingly, the Commission should waive the restrictions on entities that can participate in the auction subject to divestiture and extend the post-auction divestiture period for an additional 90 days (180 days total) by waiving 47 C.F.R. § 20.6(e)(1)(i), (ii) and (iii) and by modifying 47 C.F.R. § 20.6(e)(4). The Commission should also adopt rules to implement the bulk bid package promptly so that carriers will have the opportunity pre-auction to negotiate contingent divestiture agreements should they win the bulk bid.

II. A SET-ASIDE FOR A FEW MULTI-BILLION DOLLAR “SMALL” BUSINESSES IS UNLAWFUL.

Current Commission rules limit eligible bidders in auctions of C and F Block PCS spectrum to those entities that, along with their attributable affiliates, have less than \$500 million

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that it needs additional spectrum. *See* Comments on Petitions for Waiver of, or Forbearance From, Spectrum Cap Limits of Nextel Communications, Inc. at 2-6.

¹⁸ Recent CMRS mergers have occurred notwithstanding the need to comply with spectrum cap rules. *See, e.g.,* Applications of VoiceStream Wireless Corporation, Omnipoint Corporation, and Cook Inlet/VS GSM for Consent to Transfer of Control and Assignment of Licenses and Authorizations, *Memorandum Opinion and Order*, FCC 00-53 (rel. Feb. 15, 2000) (divestiture required to comply with the spectrum cap in 18 markets as a condition of merger approval); Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, for Consent to Transfer Control of Corporations Holding Commission Licenses and Lines, *Memorandum Opinion and Order*, 14 FCC Rcd 14712, 14927 (1999) (merger approval contingent upon divestiture of cellular licenses in 14 markets); “Bell Atlantic, GTE and ALLTEL Agree to Exchange Wireless Operations in 13 States,” *Press Release*, Feb. 1, 2000, available at <<http://www.mergerinfo.com/News/20000201.html>> (announcing agreement to transfer wireless interests in 27 markets to comply with consent decree for Justice Department approval of mergers). There is no reason to believe, based on these experiences, that other operators cannot manage to divest any spectrum they might acquire in a bulk bid that places them over the spectrum cap thresholds.

in total assets and less than \$125 million in average total revenues at the time of the auction's short-form filing deadline.¹⁹ In the *Reconsideration Order*, the Commission confirmed that it does not intend to enforce these size limits for entities that participated in the original C Block auctions. This decision to "grandfather" original C Block bidders into future auctions may well result in certain multi-billion dollar businesses receiving an unwarranted and unjustifiable opportunity to compete for spectrum set-aside for small businesses. This result is not rational and cannot be sustained on reconsideration.

A. The Current Grandfathering Exception Is Antithetical to the Designated Entity Rules.

When C and F Block PCS spectrum was set aside for small businesses, the Commission believed small businesses could not successfully compete with large entities in open auctions for PCS spectrum.²⁰ If the current grandfathering rule is maintained, the very multi-billion dollar enterprises the designated entity program was meant to exclude will bid against small businesses. Despite the fact that certain companies have far outgrown any reasonable definition of small, and despite their lack of need for continued nurturing and regulatory protection, the grandfathering

¹⁹ See 47 C.F.R. § 24.709(a) ("No application is acceptable for filing and no license shall be granted for frequency block C or frequency block F, unless the applicant, together with its affiliates and persons or entities that hold interests in the applicant and their affiliates, have gross revenues of less than \$125 million in each of the last two years and total assets of less than \$500 million at the time the applicant's short-form application (Form 175) is filed.").

²⁰ See, e.g., Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Fifth Report and Order*, PP Docket No. 93-253, 9 FCC Rcd 5532, 5585 (1994) ("We agree that small entities stand little chance of acquiring licenses in these broadband auctions if required to bid against existing large companies, particularly large telephone, cellular and cable companies."). As Greg Rosston, Deputy Director of the Stanford Institute for Economic Policy Research, has explained, however, small businesses have participated successfully in the Commission's open auctions. Indeed, of the nearly 5,000 licenses sold at auctions without set-asides, more than 300 different small businesses have obtained more than 2,600 licenses in direct competition between designated entities and non-designated entities. See Nextel Reply Comments, Declaration of Gregory L. Rosston at 5.

exception allows them to acquire spectrum their competitors cannot.²¹ Without reconsideration, the grandfathering exception will allow some parties in the July 26 reauction to make a mockery of the favored terms supposedly available only to small businesses, contrary to the principles and purposes of Section 309(j).

Moreover, the exception inconsistently only grandfathers entities that *participated* in the first two C Block auctions held in 1995 and 1996, but does not grandfather entities that participated in either the first F Block auction or the first C Block reauction that was held last year.²² Such an exclusion highlights the inherent irrationality of grandfathering and advances no policy purpose. As the courts have found, the Commission may not waive or make an exception to a rule that essentially eviscerates that rule.²³ Further, courts have struck down the Commission's actions as arbitrary and capricious when the agency's standards were inconsistently applied.²⁴ Because the grandfathering exception eviscerates the entire policy

²¹ For example, it would be ludicrous if Omnipoint Corporation, an entity that had approximately \$7.2 billion in assets at the time of its merger with VoiceStream Wireless, were eligible to obtain licenses at the reauction that are currently set-aside for small businesses.

²² TLA Spectrum, LLC and Telepak, Inc., both winners in the reauction last year, have recently questioned how the Commission can rationally exclude them from this year's reauction when Commission rules allow them to acquire C and F Block licenses in the after-market, but not at auction. *See* Letter from David L. Nace, Attorney for TLA Spectrum, LLC, Lukas, Nace, Gutierrez & Sachs, to Magalie Roman Salas, Secretary, Federal Communications Commission (March 24, 2000); Letter from David L. Nace, Attorney for Telepak, Inc., Lukas, Nace, Gutierrez & Sachs, to Magalie Roman Salas, Secretary, Federal Communications Commission (March 24, 2000).

²³ *See, e.g., WAIT Radio v. FCC*, 418 F.2d 1153, 1157-59 (D.C. Cir. 1969).

²⁴ *See, e.g., Illinois Bell Telephone v. FCC*, 740 F.2d 465, 470 (7th Cir. 1984) (“patently inconsistent application of agency standards to similar situations lacks rationality and is arbitrary”) (citing *Contractors Transport Corp. v. United States*, 5 F.2d 1162 (4th Cir. 1976)).

reason behind the C and F Block spectrum set-aside, it must be eliminated on reconsideration and well before the reauction.²⁵

B. Clarification Is Necessary to Prevent Unjust Enrichment.

In addition to eliminating the arbitrary grandfathering exception, the Commission must also clarify its qualification rule to ensure against abuse. Specifically, designated entity benefits must be predicated on accurate and meaningful financial information that reflects the beneficiary's circumstances. For example, the Commission must clarify that a designated entity reauction applicant's revenues and total assets be determined *at the time its application is filed*. Pending transactions that would cause the designated entity to exceed the caps must also be disclosed.

The asset and revenue caps were developed to ensure that only entities of "entrepreneurial" size would be eligible to acquire C and F Block licenses.²⁶ While the Commission gave applicants limited flexibility in complying with the asset and revenue caps, it also intended for applicants to provide the Commission with current data that realistically and accurately portray the applicant's present financial circumstances.²⁷ However, because the

²⁵ If the grandfathering loophole is not eliminated on reconsideration, the Commission should be mindful that similar circumstances involving large companies taking advantage of programs intended for small entities doomed the tax certificate program. *See, e.g.,* Erwin G. Krasnow and Lisa M. Fowlkes, *The FCC Minority Tax Certificate Program; A Proposal for Life After Death*, 51 Federal Communications Law Journal 665, 671-72 (1999).

²⁶ *See* Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Fifth Report and Order*, PP Docket No. 93-253, 9 FCC Rcd 5532, 5586 (1994) (explaining that the \$125 million gross revenue/\$500 million asset caps have the effect of excluding large companies).

²⁷ *See* Amendment of Parts 20 and 24 of the Commission's Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap; Amendments of the Commission's Cellular/PCS Cross-Ownership Rule, *Report and Order*, WT Docket No. 96-59, 11 FCC Rcd 7824 (1996). *See also* Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Sixth Report and Order*, PP Docket No. 99-253, 11 FCC Rcd 136,

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definition of “total assets” states that total assets shall be “evidenced by the [applicant’s] most recent audited financial statements,”²⁸ current rules could be read to allow entities that have grown significantly above the \$500 million asset cap to acquire C and F Block licenses in an auction because of the lag time between annual audited financial statements.²⁹

On reconsideration, the Commission must clarify that the revenue and asset limits that determine C and F Block eligibility *must be* determined as of an application’s filing date as required under 47 C.F.R. § 24.709(a). If an applicant’s last audited financial statements materially understate an applicant’s revenues or total assets, the applicant should be required to report its total assets to the best of its ability *as of the application’s filing date*.³⁰ A failure to address this apparent inconsistency could undermine the integrity of any continued designated entity benefits.

C. Successor Entities Should Not Qualify for “Grandfathered” Status.

In addition, if any form of a “grandfathering” exception to the Commission’s entrepreneur block size rules is maintained, the Commission *must* strictly limit that exception to

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166 (1995). The Commission permitted an applicant that did not use audited financial statements to provide a certification from its chief financial officer that the gross revenue and total asset figures contained in its short-form and long-form applications were accurate.

²⁸ 47 C.F.R. § 24.720(g).

²⁹ One possible example of this problem is illustrated by Leap Wireless International, Inc. (“Leap”). Because Leap’s fiscal year ends August 31, under the PCS auction rules, Leap may seek to use its audited financial statements from 1999 to slip in under the \$500 million total asset cap, notwithstanding its current reported market capitalization of \$2.1 billion. See CBS MarketWatch Online, *Fundamentals for Leap Wireless, Intl., Inc.*, (visited April 7, 2000) at <http://www2.marketwatch.com/quotes/extended.asp?source=htx/http2_mw&symb=lwin>.

³⁰ This responsibility of an applicant to update the accuracy of a material eligibility showing is embodied in Section 1.65 of the Commission’s rules, 47 C.F.R. §1.65, which obligates applicants to update pending applications.

only the *original licensees* in the first C Block auction. To allow “spin-off” or other successor companies and merged entities that could not themselves qualify under the entrepreneur eligibility rules to participate in the upcoming C Block reauction would eviscerate the purpose of having any eligibility rules at all.

For instance, should the Commission permit successor entities to participate in the upcoming auction, regardless of their size and eligibility, those entities may include Tritel, Inc., a leading AT&T affiliate that has announced plans to merge with TeleCorp PCS Inc. in a \$5.3 billion transaction, because it can trace its roots to Mercury Communications, a small cellular company in the Southeast during the mid 1990s that was a successful small business bidder in the original C Block auctions. As evidenced by the exponential growth of Tritel under its affiliate arrangements with AT&T Wireless, it is plain that Tritel is no longer an entrepreneur as envisioned in the rules, *i.e.*, Mercury. It is a new and distinct successor company with enormous operating revenues and capital resources well in excess of the eligibility caps for the C Block PCS reauctions.

III. CONCLUSION.

An open auction with a bulk bid package of licenses as set forth in Nextel’s Petition for Rulemaking best serves the public interest. On reconsideration, therefore, the Commission must swiftly adopt new auction rules that eliminate the designated entity set-aside, disaggregate the available 30 MHz licenses into 20 and 10 MHz blocks, and combine the available 15 and 20 MHz licenses into a bulk bid package. Only by adopting this set of auction rules will the Commission ensure that all consumers obtain the promised competitive benefits that were supposed to come from PCS, even consumer living in rural areas.

It is imperative that the Commission reauction available licenses in the manner best suited to advance the public interest. Accordingly, the Commission must not restrict access to

these licenses to only “small” business entities with a massive loophole for grandfathered parties and spin-off or successor companies. To do so would serve no public purpose and would be arbitrary and capricious given the lack of material differences between entities deemed eligible under the grandfathering exception and those that are not.

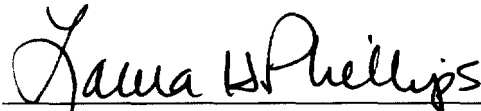
Because they are multi-billion dollar companies, the assertions of entities such as Leap, Omnipoint, VoiceStream and Tritel that the Commission should retain the C Block as the exclusive reserve for them must be rejected. It is arbitrary and capricious to allow some multi-billion dollar companies to compete in an auction under the pretext of meeting a regulatory requirement to disseminate licenses widely to small business while other similarly-situated entities are excluded. Because no one can rationally argue that these multi-billion dollar companies are “small” and therefore deserving of special treatment, the Commission must revisit its decision.

The auction rules that best serve the public interest will open the July 26, 2000 reauction to all otherwise eligible entities; divide the 30 MHz licenses into 20/10 MHz licenses; and offer one set of 10 MHz licenses, along with available 15 MHz licenses, together as a bulk bid

package. The auction proposal best meets the needs of all interested parties as well as the mandates of Section 309(j). Accordingly, Nextel respectfully urges the Commission to issue promptly new auction rules consistent with the proposals herein.

Respectfully submitted,

NEXTEL COMMUNICATIONS, INC.

A handwritten signature in black ink, appearing to read "Laura H. Phillips", is written over a horizontal line.

Leonard J. Kennedy

Laura H. Phillips

Christina H. Burrow

DOW, LOHNES & ALBERTSON, PLLC

1200 New Hampshire Avenue, N.W.

Suite 800

Washington, D.C. 20036-6802

(202) 776-2000

NEXTEL COMMUNICATIONS, INC.

2001 Edmund Haley Drive

Reston, VA 20191

(703) 433-4000

Robert S. Foosaner

Senior Vice President and Chief Regulatory Officer

Its Attorneys

April 17, 2000

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing "Comments on and Opposition to Petition for Reconsideration," were sent by hand delivery, as indicated, or via U.S. first-class mail, postage prepaid, this 17th day of April, 2000, to the following:

*Magalie R. Salas
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

*William E. Kennard
Chairman
Federal Communications Commission
445 12th Street, SW, Room 8-B201
Washington, D.C. 20554

*Susan Ness
Commissioner
Federal Communications Commission
445 12th Street, SW, Room 8-B115
Washington, D.C. 20554

*Harold Furchtgott-Roth
Commissioner
Federal Communications Commission
445 12th Street, SW, Room 8-A302
Washington, D.C. 20554

*Thomas Sugrue, Chief
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, SW, Room 3-C252
Washington, D.C. 20554

*Michael K. Powell
Commissioner
Federal Communications Commission
445 12th Street, SW, Room 8-A204
Washington, D.C. 20554

*Gloria Tristani
Commissioner
Federal Communications Commission
445 12th Street, SW, Room 8-C302
Washington, D.C. 20554

*Kathleen O'Brien Ham
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, SW, Room 3-C255
Washington, D.C. 20554

*Ari Fitzgerald
Legal Advisor to Chairman Kennard
Federal Communications Commission
445 12th Street, SW, Room 8-B201
Washington, D.C. 20554

*Robert Pepper, Chief
Office of Plans and Policy
Federal Communications Commission
445 12th Street, SW, Room 7-C450
Washington, D.C. 20554

*Christopher Wright
Officer of General Counsel
Federal Communications Commission
445 12th Street, SW, Room 3-C252
Washington, D.C. 20554

*Bryan Tramont
Legal Advisor to Commissioner
Furchtgott-Roth
Federal Communications Commission
445 12th Street, SW, Room 8-A302
Washington, D.C. 20554

*Adam Krinsky
Legal Advisor to
Commissioner Tristani
Federal Communications Commission
445 12th Street, SW, Room 8-C302
Washington, D.C. 20554

Julia K. Kane
Jeffrey A. Brueggerman
U S WEST Wireless, LLC
1801 California Street, Suite 5100
Denver, CO 80202

*Ms. Audrey Bashkin
Federal Communications Commission
Wireless Telecommunications Bureau
Legal Branch
Auctions and Industry Analysis Division
445 12th Street, SW
Washington, D.C. 20554
(2 copies)

*Via Hand Delivery

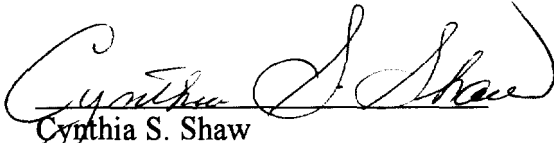
*Mark Schneider
Senior Legal Advisor to
Commissioner Ness
Federal Communications Commission
445 12th Street, SW, Room 8-B115
Washington, D.C. 20554

*Peter Tenhula
Senior Legal Advisor
to Commissioner Powell
Federal Communications Commission
445 12th Street, SW, Room 8-A204
Washington, D.C. 20554

*Amy Zoslov
Chief, Auctions and Industry
Analysis Division
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, SW, Room 4-A624
Washington, D.C. 20554

*Jonathan M. Chambers
Sprint PCS
401 9th Street, NW, Suite 400
Washington, D.C. 20004

*ITS
1231 – 20th Street, NW
Washington, DC 20036


Cynthia S. Shaw